

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF DELAWARE

3  
4 In re:

:

5 : Chapter 11

6 W. R. GRACE & CO., et al.,

: Case No. 01-01139 (KG)

7 Debtors.

: (Jointly Administered)

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9  
10 United States Bankruptcy Court

11 824 North Market Street

12 Wilmington, Delaware

13 April 30, 2018

14 3:01 p.m. - 4:12 p.m.

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20  
21 B E F O R E :

22 HON KEVIN GROSS

23 U.S. BANKRUPTCY JUDGE

24  
25 ECRO OPERATOR: GINGER MACE

1 HEARING re Maryland Casualty Company's Motion to Enforce the  
2 Permanent Channeling Injunction and for Sanctions [Filed:  
3 1/29/18] (Docket No. 32999).

4  
5 HEARING re Agreed Motion to Extend Maryland Casualty  
6 Company's Time to File Reply Papers with Respect to Its  
7 Motion to Enforce the Permanent Channeling Injunction and  
8 for Sanctions [Filed: 4/17/18] (Docket No. 33022).

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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1 P R O C E E D I N G S

2 CLERK: Please rise.

3 THE COURT: Good afternoon, everyone. Thank you.  
4 You may be seated.

5 MAN 1: Good afternoon.

6 THE COURT: I'm seeing a strange face in this  
7 case, I know. Mr. Wisler, good afternoon.

8 MR. WISLER: Good afternoon, Your Honor. Jeffrey  
9 Wisler, on behalf of Maryland Casualty Company. Your Honor,  
10 I promise this won't take as long as last week's Patriot  
11 hearing.

12 THE COURT: Good.

13 MR. WISLER: Your Honor, this is Maryland  
14 Casualty's motion to enforce final orders of this Court,  
15 including the permanent channeling injunction arising from  
16 the confirmed plan of reorganization of W.R. Grace.

17 THE COURT: Yes.

18 MR. WISLER: Your Honor, I'd like to introduce you  
19 to my co-counsel, Edward Longosz, from Eckert Seamans.

20 THE COURT: Welcome.

21 MR. WISLER: Mr. Longosz --

22 THE COURT: Good to have you here.

23 MR. WISLER: -- and I have been involved in this  
24 case since -- well, as long as Mr. Cohn has, actually, also.

25 THE COURT: Okay.

1 MR. WISLER: I may have a little bit of time on  
2 both of them, but we've been involved for a long time. So,  
3 with that, Your Honor, I'll turn the podium over to Mr.  
4 Longosz.

5 THE COURT: Thank you, Mr. Wisler. Thank you,  
6 sir. Mr. Longosz, it's good to have you here.

7 MR. LONGOSZ: Thank you, Your Honor. I apologize,  
8 over the weekend, I think my voice left me, not because I  
9 was cheering for my favorite sports team, but because of the  
10 pollen.

11 THE COURT: I understand.

12 MR. LONGOSZ: So, that's my Mr. Wisler is here,  
13 just in case I need some reinforcements.

14 THE COURT: We'll work through it.

15 MR. LONGOSZ: Thank you, Your Honor.

16 THE COURT: Yes.

17 MR. LONGOSZ: So, Your Honor, what brings us here  
18 today -- and again, good afternoon, and Edward Longosz, for  
19 the record. Thank you again for accommodating us from last  
20 week's rescheduling, sir.

21 THE COURT: Yes.

22 MR. LONGOSZ: We appreciate that.

23 THE COURT: I certainly understand that, Mr.  
24 Longosz.

25 MR. LONGOSZ: So, Your Honor, we're here -- and

1 I'll hearken back to what Yogi Berra said, déjà vu all over  
2 again.

3 THE COURT: Yes.

4 MR. LONGOSZ: I've been living with this case  
5 since 2001, since the outset, as has other counsel here.  
6 I've gone through all the various motions and reiterations  
7 through Judge Fitzgerald looking at the case, making some  
8 rulings on motions to enforce, clarifications, setting up  
9 the injunction with respect to Maryland Casualty and other  
10 insurers.

11 THE COURT: Yes.

12 MR. LONGOSZ: Also, I was here and argued the  
13 motion before Judge Carey, which leads us to why we're here  
14 today.

15 Your Honor, just if I could give some -- frame the  
16 issues and give some preliminary thoughts, I know --

17 THE COURT: Please do, because I'm fairly -- you  
18 know, I'm somewhat new to the matter.

19 MR. LONGOSZ: Okay.

20 THE COURT: And it would be helpful, anything --  
21 any background you've got, Mr. Longosz.

22 MR. LONGOSZ: Sure. With respect to this case,  
23 the case emanates out of the W.R. Grace bankruptcy,  
24 obviously.

25 THE COURT: Yes.

1 MR. LONGOSZ: And what we have here today is only  
2 one issue before the Court, and that's the motion to enforce  
3 the permanent channeling injunction and order.

4 I think, and we believe, that there's only one  
5 question, and that's the enforcement of the injunction. We  
6 don't believe that there's any question with respect to the  
7 due process aspects of it. You may have read the papers  
8 something about a request for a stay based on the pending --

9 THE COURT: Third Circuit, yes.

10 MR. LONGOSZ: -- the Third Circuit. I'll get into  
11 that a little bit later and be happy to answer any questions  
12 Court may have --

13 THE COURT: Okay.

14 MR. LONGOSZ: -- relative to that. But Roberts --  
15 just so I can stage for Roberts -- and we can talk about  
16 some of the other things that happened on the way up to  
17 Roberts -- Roberts is a non-Grace non-worker employee case.  
18 I think that's very, very important for purposes of our  
19 discussion today.

20 Roberts falls under the no workers' compensation  
21 scheme. So, Roberts is not covered by any workers'  
22 compensation policy --

23 THE COURT: Right.

24 MR. LONGOSZ: -- doesn't get the benefit of any  
25 policy; none of his claims would arise out of anything even

1 remotely close to workers' compensation policy. The reason  
2 that's important is -- as you know, and as you probably read  
3 --

4 THE COURT: Yes.

5 MR. LONGOSZ: -- Judge Carey talked about claims  
6 arising out of the workers' compensation policy, and that's  
7 not contained within Exhibit 5.

8 THE COURT: Right.

9 MR. LONGOSZ: Okay.

10 THE COURT: Right.

11 MR. LONGOSZ: There is no allowance, for purposes  
12 of this case and for purposes of Judge Carey, and we'll talk  
13 about what he found. There's no allowance for any claim by  
14 a non-worker. So, this is -- Roberts, I believe, wasn't  
15 even somebody you could say was remote -- it's a  
16 townspeople; it's an individual that lived in Libby, Montana  
17 -- may have...

18 In Libby, Montana, just to give you some -- to  
19 capture the essence of that section of Montana, there's  
20 mountains; Libby's in a valley. The Libby mine is a mine  
21 that's up in the -- they call it Libby Mountain. The mined  
22 the ore there. They packaged it and did some processing of  
23 it. It was brought down the mine, from the mine, to the  
24 railroad yard. It was loaded, and you've probably seen BNSF  
25 mentioned --



1 THE COURT: Yes.

2 MR. LONGOSZ: -- through some of the papers, it  
3 was loaded onto railcars and the railcars took it away to  
4 its final destination or other destinations.

5 THE COURT: Yes.

6 MR. LONGOSZ: Now, there's some people that claim  
7 that while the railcars were moving along the railroad,  
8 people were fishing, they were hunting, they breathed the  
9 asbestos as it's going along, so therefore, they would have  
10 claims against the Railroad for not tarping the cars or  
11 doing something relative to the cars. They would likewise  
12 have claims, or would have claims, against W.R. Grace.

13 So, to give context, Mr. Roberts was not even  
14 close to being any of those individuals.

15 THE COURT: Well, the claim is by Mrs. Roberts on  
16 behalf of Mr. Roberts.

17 MR. LONGOSZ: Roberts, and --

18 THE COURT: Is that right?

19 MR. LONGOSZ: Right. And Mr. Roberts was not a  
20 worker --

21 THE COURT: Right.

22 MR. LONGOSZ: -- not a mine worker --

23 THE COURT: Right.

24 MR. LONGOSZ: -- not a railroad rep. Didn't have  
25 anything to do with Maryland Casualty or the mine where

1 Maryland Casualty was a workers' compensation carrier.

2 THE COURT: Exactly. And that's what Judge Carey  
3 ruled, that the workers' compensation claims remained  
4 viable, but non-workers' compensation claims are subject to  
5 the injunction.

6 MR. LONGOSZ: Correct.

7 THE COURT: Okay.

8 MR. LONGOSZ: And that's why we're here on the  
9 motion to enforce.

10 THE COURT: Right.

11 MR. LONGOSZ: I think the Plaintiffs take a  
12 different view of that, or -- I'm not sure what their view  
13 is, other than the fact that they think they get the  
14 benefit, somehow, of the workers' compensation scheme, that  
15 Maryland Casualty was doing work in the mine as a workers'  
16 compensation carrier, so therefore, that carries over to  
17 non-employees, that Judge Carey rejected. I believe he used  
18 the word "rejected" that argument.

19 THE COURT: Yes.

20 MR. LONGOSZ: So, the Libby claimants lost that  
21 argument, did not appeal, nor did Maryland Casualty. I  
22 guess we were all comfortable with that decision in the  
23 sense that we could go -- if claimants filed a claim on  
24 behalf of a worker in State Court, it would be a claim bad  
25 faith for the provision of workers' comp, the delivery of

1 workers' compensation insurance, any iteration of claim they  
2 had arising out of workers' compensation program as an  
3 employee. Those cases will be fought in State Court. And  
4 Judge Carey said, "to the extent that such cases even  
5 existed", and we'll let the State Court whether that's even  
6 a viable claim.

7 So, in fact, the Libby claimants, Mr. Hutt in  
8 particular, has filed a State Court claim. Read something  
9 about this Asbestos Claims Court. I'll talk about that a  
10 little bit.

11 THE COURT: Yes.

12 MR. LONGOSZ: But that's included within the  
13 Asbestos Claims Court cases. It's actually set for trial in  
14 February of next year.

15 THE COURT: Okay.

16 MR. LONGOSZ: And we haven't gotten through  
17 discovery. We haven't even gotten to the point of  
18 determining, or having the Court determine, whether a viable  
19 State Court claim exists for purposes of Mr. Hutt. But he  
20 did file a case; it's a viable case there. The problem is  
21 now Ms. Roberts has filed on behalf of her husband, a State  
22 Court claim --

23 THE COURT: Yes.

24 MR. LONGOSZ: -- or hasn't dismissed the State  
25 Court claim that was filed. And we also have another case -

1 - well, there's many, many cases; there's hundreds of cases  
2 now. But we were just in State Court last week, actually  
3 the day before we were supposed to argue this, on a case  
4 called Hunt. And Hunt is another non-worker where the  
5 Plaintiffs are continuing to pursue that case.

6 And you may have seen in their opposition, they  
7 filed an adversary complaint relating to Mr. Hunt. That is  
8 neither here nor there for purposes of our motion today.

9 THE COURT: Okay. Okay.

10 MR. LONGOSZ: But it's a State -- it's a non-  
11 worker who is proceeding with his claim in State Court,  
12 notwithstanding the bar imposed by the injunction in this  
13 case.

14 Now, I will -- just for full disclosure, both  
15 Maryland Casualty and the Plaintiffs had alerted the State  
16 Court Judge that we have this motion pending and put the  
17 Court on notice. The Court -- the State Court Judge said,  
18 well, that's nice, but until I see an order, you know, I'm  
19 going to issue a scheduling order. And there's a scheduling  
20 order there, so --

21 THE COURT: Is this the one where trial is  
22 scheduled for September?

23 MR. LONGOSZ: I believe --

24 THE COURT: Or is that a different matter?

25 MR. LONGOSZ: That's a different matter.

1 THE COURT: Okay.

2 MR. LONGOSZ: The trial -- Judge, there are  
3 deadlines in September --

4 THE COURT: Okay.

5 MR. LONGOSZ: -- for everybody. The trial is not  
6 scheduled until next February.

7 THE COURT: Okay, okay.

8 MR. LONGOSZ: But there's very, very rigorous  
9 deadlines. In fact, experts are due in July.

10 THE COURT: All right.

11 MR. LONGOSZ: And we were just -- Maryland  
12 Casualty was just amended and brought into the case and  
13 served.

14 THE COURT: Okay. And this is the Roberts case?

15 MR. LONGOSZ: That was the Hunt case.

16 THE COURT: The Hunt case, we're talking about.  
17 Okay.

18 MR. LONGOSZ: In Roberts, there's nothing going on  
19 in State Court.

20 THE COURT: Okay.

21 MR. LONGOSZ: Okay. And that's -- and the reason  
22 be brought it is because it was a case reflective of a non-  
23 worker. It is a true non-worker traditional case, and it  
24 was a good case for this Court to look at and us to be able  
25 to explain to the Court why the injunction applied and

1 should be enforced. And there are no deadlines. It was --  
2 with the advent of the Asbestos Claims Court, it got  
3 everybody's attention --

4 THE COURT: Okay.

5 MR. LONGOSZ: -- and brought to this Court. Just  
6 to give a little context to the Asbestos Claims Court,  
7 apparently back in 2001 or the late 1990s, the Legislature  
8 enacted a provision that allowed for the Montana Supreme  
9 Court to put into effect what's called an Asbestos Claims  
10 Court. Because of all these W.R. Grace cases that were  
11 emanating out of, in particular, Libby, Montana.

12 THE COURT: Okay.

13 MR. LONGOSZ: And Libby, Montana probably has 2000  
14 residents, 3000 residents, all of which are claiming they  
15 have an asbestos-related disease. If you notice, the plan  
16 the carveout for the Libby claimants --

17 THE COURT: Yes.

18 MR. LONGOSZ: -- which they're availing themselves  
19 of. The trust is there and they're availing themselves of  
20 the trust proceeds. The Libby, I think, was dedicated as an  
21 EPA cleanup site. It's very, very -- it ended up being  
22 very, very bad after 70 years of mining there.

23 But that said, Grace filed bankruptcy in '01.

24 THE COURT: Yes.

25 MR. LONGOSZ: Therefore, the necessity of the

1 Asbestos Claims Court was not necessary, was unnecessary.  
2 Fast forward to last year, Grace comes out of bankruptcy. A  
3 couple years ago, BNSF, International Paper, a variety of  
4 other defendants were being sued, the State of Montana, were  
5 all being sued, and the courts were being overwhelmed. The  
6 state courts were being overwhelmed, underfunded.

7 So, the Supreme Court in late last year decided to  
8 turn the key, so to speak, to the Asbestos Claims Court, and  
9 bring that court to life, and dedicated a District Court  
10 judge, Judge Eddy, to oversee the Asbestos Claims Court, and  
11 to bring all these vermiculite, W.R. Grace, Libby, Montana  
12 cases under its fold. I think there's probably close to  
13 2000 claims; the last week could count, there's probably  
14 1600, 1700 claims that are either before the Court or will  
15 be before the Court.

16 So, what the Court's trying to do is parse those  
17 cases.

18 THE COURT: Sure.

19 MR. LONGOSZ: There's a variety of things that are  
20 going to be coming up before that Court, including whether  
21 in fact these people, these individuals, have asbestos-  
22 related disease, number one, or whether they're injured or  
23 impaired. So, there's going to be a big hearing in July  
24 relative to that. It's particularly important for the  
25 Railroad, the State of Montana, International Paper, and

1 some of the other defendants. To wit, Maryland Casualty is  
2 being sued, or being served in lawsuits that have been filed  
3 that we didn't know about, weekly, monthly, with respect to  
4 cases before the Asbestos Claims Court.

5 Thus far, the only cases that have been brought,  
6 or had been brought, worker cases, or cases that we could  
7 discern might have been worker cases, or at least are in our  
8 policy period. Now what's happened is that there -- a lot  
9 of cases are being brought in. There's no differentiation  
10 or distinction between worker and non-worker cases.

11 THE COURT: Okay. Okay.

12 MR. LONGOSZ: Notwithstanding the order, Judge  
13 Carey's order. And Judge, really, just -- I don't want to  
14 fast-forward to the end --

15 THE COURT: Is the Robert's case, is this -- is  
16 the Robert's case a test case, in effect?

17 MR. LONGOSZ: It could be for the purposes of this  
18 Court, yes.

19 THE COURT: Yes.

20 MR. LONGOSZ: Because I think what the Court does  
21 here is going to have applicability to the other cases. It  
22 will have applicability to the other cases because if there  
23 is a case similar to Roberts, the Plaintiffs should be -- if  
24 the Court agrees with our position and Judge Carey's  
25 position -- then those cases would be dismissed, and the



1 Plaintiffs will have to critically look through their cases  
2 to discern whether they have their worker or non-worker --

3 THE COURT: Right.

4 MR. LONGOSZ: -- whether covered by the workers'  
5 compensation policy or not. From what we can tell -- we  
6 just got this information recently -- there's probably about  
7 200 to 300, maybe in that 270 zone, of cases that appear to  
8 be worker cases, at least from our count, out of the 1600 or  
9 so cases. So, we know that there are some cases out there  
10 that have to be teased out, but this, in effect, yeah, we  
11 could call this a bell weather test case.

12 THE COURT: Okay. Because you haven't brought a  
13 defendant class, for example, in --

14 MR. LONGOSZ: No, and we could have brought 1500  
15 of these --

16 THE COURT: Yeah.

17 MR. LONGOSZ: -- or 100 of these, or 200 of these.  
18 But pretty much the Plaintiffs know. And that's why the due  
19 process argument doesn't really work. Everybody knows what  
20 a worker is and does -- a worker is not. Actually, the  
21 Plaintiffs know the Defendants we don't know, but they know  
22 which ones are workers and non-workers.

23 So, the applicability would be there with respect  
24 to them. They're all represented by the same Plaintiffs'  
25 counsel in Montana.

1 THE COURT: Okay.

2 MR. LONGOSZ: So, there is one other firm, the  
3 Lewis firm, who was involved in the bankruptcy in this  
4 court, who has some claimants. But none of those claimants,  
5 curiously, have filed a lawsuit against Maryland Casualty to  
6 our knowledge --

7 THE COURT: Okay.

8 MR. LONGOSZ: -- or prosecuted one. It's only the  
9 McGarvey firm, that Mr. Cohn's here today.

10 THE COURT: All right.

11 MR. LONGOSZ: Really, what we want, it's the  
12 sanction part of this is to tell them to stop. Stop filing  
13 cases and dismiss the cases that are not properly before the  
14 State Courts. We're not sitting here saying we want lots of  
15 money or lots of sanctions. I think the Court knows what  
16 we're looking for in terms of the end.

17 But we had to make sure that we let the Court know  
18 we take this very, very seriously. And these are, in some  
19 ways, contemptuous because Judge Carey did have a very  
20 defined, very direct opinion --

21 THE COURT: Yes, he did.

22 MR. LONGOSZ: -- and order. And so, we want to  
23 make sure that everybody understood the gravity of what  
24 we're talking about, including Your Honor.

25 THE COURT: Absolutely.

1 MR. LONGOSZ: Now, I think the Plaintiffs may  
2 claim they are between a rock and a hard spot in Roberts.  
3 Are they allowed to proceed; not allowed to proceed? The  
4 Plaintiffs never came to the Court for relief after Judge  
5 Carey's opinion. Never sought -- said, well, wait a minute,  
6 let's move to reconsider, let's appeal, or let's get further  
7 clarification of what you really meant, Judge Carey, in  
8 connection with your opinion and your order. And that never  
9 happened. But what was happening was that it was business  
10 as usual for the Plaintiffs.

11 Now, if we could go back -- so going back in time  
12 to during the bankruptcy proceeding, recall that Judge  
13 Fitzgerald entered an order in 2002 denying Girard's motion  
14 to clarify and the scope of the preliminary injunction to  
15 modify the preliminary injunction. The Libby claimant --  
16 and what Judge Fitzgerald said is that this applies to, you  
17 know, the insurers, including Maryland Casualty and CNA --  
18 the Plaintiffs, the Libby claimants, lost that motion with  
19 Judge Fitzgerald.

20 The Third Circuit agreed with Judge Fitzgerald.  
21 The plan was later confirmed on February 3rd, 2014.

22 THE COURT: Yes.

23 MR. LONGOSZ: Roberts, as a non-employee, files  
24 his suit February 25th, 2014. So, Judge Carey -- the plans  
25 confirm that Roberts files a suit, maybe because they

1 thought that there was a tolling provision they had to file  
2 within the 60 days after the plan of confirmation, based on  
3 Judge Fitzgerald's order. So, they filed that. But they  
4 initiate their DJ in October of 2014, October 21, 2014.  
5 Judge Carey issued his opinion on October 17, 2016.

6 And if the Court looks at the timeline, Judge  
7 Carey, almost a year to issue that opinion. And I say it  
8 took him so long because he was looking at the case --  
9 although he did say that he wished Judge Fitzgerald had not  
10 retired --

11 THE COURT: Yes, I --

12 MR. LONGOSZ: -- during arguments. So, but that  
13 said, he took the time, the care, the consideration to look  
14 at what was going on, to look at whether these claims, or  
15 maybe some of these claims, were part of, derivative of,  
16 subject to (indiscernible) asbestos.

17 And in fact, Judge Carey made a very prophetic  
18 comment during the course of the proceeding, as he said to  
19 Mr. Cohn that, "Maybe I don't quite see things the way you  
20 do. Maybe I see them through a different prism." And that  
21 was prophetic because when the decision came out, Judge  
22 Carey did see things through a different prism.

23 Quite frankly, we were hoping that workers'  
24 compensation claims would not be allowed because we view  
25 those as statutory claims, and you could only bring a

1 statutory claim. But Judge Carey to do a carveout for the  
2 plaintiffs--

3 THE COURT: Yes.

4 MR. LONGOSZ: -- based on what was before him.

5 THE COURT: I assume that's a somewhat finite  
6 group of people, too, isn't it?

7 MR. LONGOSZ: It is.

8 THE COURT: Yes.

9 MR. LONGOSZ: It is.

10 THE COURT: Yeah.

11 MR. LONGOSZ: You're either a worker or you're not  
12 a worker.

13 THE COURT: Right.

14 MR. LONGOSZ: Either you worked in a mine as a  
15 Grace employee or not. If you were a Grace employee and  
16 worked in the mine, you were covered by workers'  
17 compensation --

18 THE COURT: Yes.

19 MR. LONGOSZ: -- insurance.

20 THE COURT: Yes.

21 MR. LONGOSZ: And whatever flowed out of that, the  
22 provision of workers' compensation insurance, the Libby  
23 claimants could, Judge Carey said, make whatever claims you  
24 want to. Now, we would argue that the only claim you could  
25 make is a workers' compensation claim.

1 THE COURT: Right.

2 MR. LONGOSZ: And for example, if you were denied,  
3 you made a workers' compensation claim, you were denied that  
4 claim and you thought there was bad faith in the denial of  
5 that, you can proceed to file that under the construct of  
6 the laws of Montana. Plaintiffs may take it, or obviously  
7 are trying to take it a step further, and say well, there  
8 should have been this industrial hygiene, there should have  
9 been all these things for the workers.

10 So, maybe they do have a cause of action by virtue  
11 of the provision of workers' compensation insurance. Of  
12 course, the State Court is going to have to look at that to  
13 see if there was a duty required, whether there were bundled  
14 or unbundled services, what the scope of the involvement of  
15 Maryland casualty was, was it just a workers' compensation  
16 carrier, did it provide more, or just workers' compensation  
17 benefits to W.R. Grace at the time?

18 THE COURT: Yes.

19 MR. LONGOSZ: I suggest to the Court they did not,  
20 but that's for another day, another court.

21 THE COURT: Another court, yes.

22 MR. LONGOSZ: Right. But unless you're a worker  
23 and you get the benefit of that policy, you don't have a  
24 ground to stand on for purposes of bringing an action. And  
25 that's why Judge Carey was so careful in his language and

1 his opinion.

2 The Plaintiffs were trying to suggest, and they  
3 were trying to push beyond the edges of just workers'  
4 compensation, and they talked about things like negligence  
5 and things of that nature. And Judge Carey brought that  
6 back and said, no, no, no. You can't just bring this  
7 wholesale negligence action because that would be channeled  
8 into the channeling injunction, and you can't bring those.

9 The reason Plaintiffs were trying to do that is  
10 because they wanted to expand the scope of that declaratory  
11 judgment action. Because I guarantee what they would've  
12 been doing is saying, ah, Judge Carey allowed those, so  
13 therefore I can add my 1600 claims on behalf of non-workers  
14 that are clearly not channeled. And that, as Judge Carey  
15 said, was absolutely wrong --

16 THE COURT: Okay.

17 MR. LONGOSZ: -- and was not correct. The funny  
18 thing is -- and I hate to say that -- it's colloquial, the  
19 funny thing is -- the Plaintiffs chose to appeal the CNA  
20 case.

21 THE COURT: Right,

22 MR. LONGOSZ: And the first part of our case, the  
23 Maryland Casualty case, was almost for a very, very similar  
24 grounds. You know, Judge Carey found the same as he did for  
25 CNA.

1 THE COURT: Yes.

2 MR. LONGOSZ: Why didn't the Plaintiff appeal?

3 Only they know for sure. But what we're left with is a  
4 final order in this case. And whatever the Third Circuit  
5 may or may not do at any other time is of no consequence and  
6 no moment to this case because we have a final order that  
7 needs to be implemented and enforced. And in fact --

8 THE COURT: But if the Third Circuit goes against  
9 you on the appeal --

10 MR. LONGOSZ: If it does?

11 THE COURT: -- and it does -- wouldn't that have  
12 an impact here too?

13 MR. LONGOSZ: Well -- I thought my counsel was  
14 sending me a note --

15 THE COURT: Oh, oh. You thought he was going to  
16 save you. No, but --

17 MR. LONGOSZ: The lifeline.

18 THE COURT: Wouldn't that have an effect?

19 MR. LONGOSZ: What do you mean by goes against me?  
20 Here's the problem. The issues with respect to -- the Third  
21 Circuit can do a variety of things. The real issue before  
22 the Third Circuit right now is CNA prevailed on those issues  
23 relating to the negligence components.

24 THE COURT: Yes,

25 MR. LONGOSZ: And CNA also prevailed because the



1 workers' comp policy was covered under Exhibit 5. And it  
2 was a very lively argument. I don't know if counsel  
3 provided the argument or a copy of the argument, the Third  
4 Circuit argument; we can certainly provide that to the  
5 Court. But I think the only thing we would get out of it is  
6 perhaps a dicta that would not necessarily be wholesale  
7 applicable to Maryland Casualty. Because the issues are not  
8 Maryland Casualty issues that are teed up with respect to  
9 the Third Circuit.

10 Third Circuit doesn't have the issues where Judge  
11 Carey parsed out the claims and only permitted the workers'  
12 compensation claims to go forward.

13 THE COURT: Okay.

14 MR. LONGOSZ: So, CNA has different arguments, a  
15 different construct before it. And maybe there's wishful  
16 thinking, maybe there's hope, maybe let's wait and see what  
17 they do, and if they -- if there's any language in there  
18 that we could come back and convince Judge Gross could weigh  
19 against Maryland Casualty, let's wait and see what happens.  
20 The problem is the appeal our case and consolidate it with  
21 the CNA case.

22 THE COURT: Yeah.

23 MR. LONGOSZ: If they had believed in their  
24 position, they would have done that. I think the real issue  
25 there is really -- is going to see whether in fact that

1 Exhibit 5 holds up on the CNA side.

2 THE COURT: Okay.

3 MR. LONGOSZ: Pretty solid on the other arguments;  
4 very, very solid on the other arguments.

5 So, then what we have is Roberts is served in  
6 February of 2017 and the amended complaint is filed on May  
7 17, 2017, and then the Asbestos Claims Court is activated in  
8 November, at the end of November 2017. That's why we filed  
9 this motion, because all of a sudden, all these cases were  
10 coming to a head.

11 And not to say there haven't been discussions, you  
12 know, relative to the effective -- what was the effect of  
13 the Third Circuit, what would be the affect of a decision  
14 here. There's a lot of discussion going on with the Libby  
15 claimants.

16 And in fact, you know, it's interesting. A  
17 question one might want to pose is that if the Third Circuit  
18 affirms, does that mean that Judge Gross doesn't have to  
19 make any decisions and all those cases go away except for  
20 the worker cases? I guarantee you're not going to get that  
21 commitment.

22 THE COURT: No.

23 MR. LONGOSZ: You're not going to get that.

24 THE COURT: I wouldn't think so.

25 MR. LONGOSZ: I tried to get it and in fact

1       couldn't. So, to answer your question, no, the Third  
2       Circuit, we don't believe is going to be case dispositive  
3       --

4               THE COURT: Okay.

5               MR. LONGOSZ: -- anything that's before this  
6       Court, especially when we're looking at a final order. If  
7       in fac there is -- if there is anything to tease out of this  
8       by Libby claimants, they're very good at pivoting, and if  
9       Your Honor decides to enforce the injunction, as we request,  
10      I'm sure that there is -- and the Third Circuit comes down  
11      with a decision or opinion, there may be some sort of  
12      equitable claim that they could make relative to that.

13              But it's just like -- it's like any case where you  
14      have the law as it is today, and a Third Circuit can decide,  
15      or a Fourth Circuit can decide something two, three, four  
16      years from now that could change what happened in the past.  
17      And while it's not something maybe so imminent, there was  
18      never a request -- and I find it telling there was never a  
19      request to stay Roberts when we first filed the motion. And  
20      I guess one wanted to see how the briefing went, one wanted  
21      to see how the argument went, and then maybe finally come  
22      back to Judge Gross and say, eh, could you wait and see what  
23      the Third Circuit says?

24              If it was so important for that Third Circuit  
25      opinion, Libby claimants, the Roberts, Roberts would have

1 filed a motion to stay right away.

2 THE COURT: Mm hmm.

3 MR. WISLER: In fact, we were expecting it, if in  
4 fact the Plaintiffs were so solid in their position.

5 Again, just to set the stage, following the Hutt  
6 DJ action, it is our belief that all non-employees should  
7 have been dismissed rather than -- rather, none that we know  
8 were dismissed, but many were filed. And there could be no  
9 more guidance than that which was provided to the parties  
10 than what Judge Carey provided.

11 It's interesting that -- I'm going to go through a  
12 little bit of the argument with respect to Judge Carey's  
13 opinion. But the Plaintiff argues in their briefing, and I  
14 found it to be interesting that they said they got what they  
15 wanted; we won. You know, they lost four out of six  
16 arguments. And they lost the four arguments that would've  
17 put non-employees in the Plaintiffs' chair in State Court.

18 So, maybe they did get what they wanted. They  
19 were able to salvage the employee claims and be able to file  
20 workers and employees of W.R. Grace, but they didn't win the  
21 Hutt case or the Osborn case, based on Judge Carey's  
22 opinion.

23 So, the reason I said déjà vu all over again, the  
24 Plaintiffs have argued this, and they've argued this for the  
25 last 17 years. They argued it during plan confirmation, and

1 we won. They argued it before Judge Carey, and we won.  
2 There's nothing new here with respect to this response. In  
3 fact, Plaintiff never responded substantively even to our  
4 motion, and there's a reason for that.

5 So, Your Honor, I'm just going to talk a little  
6 bit about our motion. I think it's been well briefed.

7 THE COURT: Yes.

8 MR. LONGOSZ: I think the most hard-hitting part  
9 of it -- I'd ask the Court to look at it again as our reply  
10 brief. I think our reply brief really sets it in a concise  
11 manner where we stand with respect to this.

12 But just to set the stage, Libby Plaintiffs Hutt  
13 and Osborn were former Grace mine employees represented by  
14 the same Montana firm, and they sought to test the limits of  
15 the channeling injunction by filing the dec action. No  
16 problem there. I think that's an appropriate way to do it.

17 Hutt and Osborn sought clarification as to the  
18 scope of the channeling injunction. The procedure they used  
19 correctly sought permission to file certain specific State  
20 Court claims for negligence in the provisional industrial  
21 hygiene and bad faith treatment of workers. And if you look  
22 at all these State Court claims, they all have, and they all  
23 talk about, negligence in the provision of industrial  
24 hygiene.

25 The problem is, they do it on behalf of non-

1 workers. They just think they can mix and match, they can  
2 just throw, you know, the same claims, regardless of what  
3 happened in Hutt and Osborn, so that this Court or any court  
4 could allow those claims to proceed.

5 Hutt and Osborn's adversary complaint contained  
6 three arguments as to why they had not yet filed a court  
7 claim at the time should be allowed to proceed outside of  
8 the channeling injunction. And this is important. The  
9 adversary counts, 1 and 4, said that 524(g) does not permit  
10 the channeling injunction to enjoin Plaintiffs' claims.

11 524(g) permits third-party injunction only to the  
12 extent claims alleged liability derivative of the Debtors,  
13 and that arise by specific relationship, including provision  
14 of insurance. Okay? Recall that Judge Carey rejected that  
15 argument.

16 THE COURT: Yeah.

17 MR. LONGOSZ: Counts 2 and 4 said if the claims  
18 arise by provision of insurance, that insurance must be  
19 workers' compensation policies, which are excluded because  
20 they were not listed in Exhibit 5 of the plan. Plaintiffs  
21 prevailed on that.

22 Adversary counts 3 and 5 asked if claims arise by  
23 provision of insurance, such insurance must be workers'  
24 compensation policies, and coverage for workers'  
25 compensation benefits may not be channeled by 524(g)

1 injunction. Plaintiffs -- Judge Carey rejected that  
2 argument.

3 So, the only one we're left with, if the claims  
4 arise by provision of insurance, that insurance must be  
5 workers' compensation policies. And workers' compensation  
6 policies, by their very nature, can only be and include  
7 workers, which are excluded because they are not listed in  
8 Exhibit 5 to the plan. That's the only counts that  
9 Plaintiff prevailed on.

10 So, put another way, Judge Carey permitted the  
11 proposed claims on these narrow grounds. Part of the  
12 argument encompassed within Counts 2 and 4, was that if  
13 Plaintiffs' claims arose by provision of insurance, that  
14 insurance must be workers' compensation policies because the  
15 CGL --

16 THE COURT: Yes.

17 MR. LONGOSZ: -- policies excluded claims made by  
18 workers, and Plaintiffs Hutt and Osborn were workers. So,  
19 workers' compensation workers; workers' compensation covers  
20 employees; Judge Carey said not included in Exhibit 5;  
21 Maryland Casualty, too bad; you have to -- you may be  
22 responsible, based on the State Court, for employees.

23 I say relief, or the relief requested in Counts 2  
24 and 4 was specifically premised on Plaintiffs' status as  
25 workers.

1 Now, Judge Carey rejected the broader relief, as I  
2 talked about, in Counts 1 and 4, and said that he determined  
3 that the asbestos PI channeling injunction was proper under  
4 the requirements of 524(g), and that 524(g)'s exclusion for  
5 workers' compensation benefits was only for statutory claims  
6 for benefits, not tort claims like Hutt's and Osborn's. So  
7 again, he linked it back to 2 and 4, where he permitted  
8 workers to proceed.

9 And just on Paragraph -- just referring the Court  
10 again to our motion to enforce, Paragraph 27 of the motion,  
11 where Judge Carey -- and I don't want to read the whole part  
12 in here, but I think it's very important. "Accordingly, I  
13 reject the Plaintiffs' arguments asserting Counts 1 and 6  
14 that the Bankruptcy Code 524(g) limits the reach of asbestos  
15 PI channeling injunction and prevents this injunction from  
16 enjoining Plaintiffs' claims."

17 And Judge Carey goes on to talk about that. "But  
18 I think it's important to say Plaintiffs' claims seek to  
19 hold MCC indirectly liable for the conduct of claims against  
20 or demands of the Debtors, and those are precisely the non-  
21 employee claims. Also, MCC's provision of insurance to the  
22 Debtors is legally relevant to, or at the very least a close  
23 nexus to the Plaintiffs' claims because MCC's liability  
24 could affect estate of the Debtors' estate, determining that  
25 524(g)(4)(A)(2) protects an insurer from claims such as the



1 negligence claim and the bad faith claim is not beyond the  
2 jurisdiction of this court."

3 THE COURT: So, what you would like me to do,  
4 basically, is to somewhat narrowly apply Judge Carey's  
5 ruling to the Roberts case and say the Roberts case is not a  
6 workers' compensation case, and therefore, it is enjoined --

7 MR. LONGOSZ: And it's not an employee case.

8 THE COURT: That's right.

9 MR. LONGOSZ: Not an employee case.

10 THE COURT: Right.

11 MR. LONGOSZ: I would love it if the Court would  
12 say it's not a workers' compensation case, and we argue  
13 that, and I would argue that only workers' compensation  
14 cases could proceed. But in fairness, I think that is  
15 certainly something we'll have to argue with respect to the  
16 State Court as to what is the extent of the type of claim  
17 that can emanate for a worker arising out of a workers'  
18 compensation claim --

19 THE COURT: Okay.

20 MR. LONGOSZ: -- or case.

21 THE COURT: Okay.

22 MR. LONGOSZ: But yes, Your Honor, it's -- if  
23 you're not a worker, and you're not -- and you're not  
24 covered -- if you're not a worker, you're not covered by  
25 workers' compensation. Only employees are covered by

1 workers' compensation, and only workers' compensation  
2 claims, however they may be, only employees with workers'  
3 compensation claims or coverage or are entitled to the  
4 provision of insurance, and therefore -- so that would be --  
5 that's the enforcement of Judge Carey's order.

6 THE COURT: Okay.

7 MR. LONGOSZ: And if Judge Carey were here, we'd  
8 be asking him for the same thing.

9 THE COURT: Understood.

10 MR. LONGOSZ: Your Honor, I think you -- I don't  
11 want to beat the dead horse. I think it's pretty clear what  
12 we are asking for. I do believe that the form in the  
13 enforcement motion is proper. I think we cited cases where  
14 -- we wouldn't be asking for an injunction on the  
15 injunction. We don't have to file another adversary  
16 proceeding. I think the case law is in -- and this Court  
17 certainly has the power to enforce those orders. And we're  
18 asking the Court to do that.

19 THE COURT: Okay.

20 MR. LONGOSZ: The stay, I think we've amply  
21 indicated to the Court why the stay doesn't -- the Court  
22 does not need to wait for the Third Circuit opinion. It  
23 does not to stay this. We're asking for enforcement of a  
24 final order of this Court. The channeling injunction is --  
25 for purposes of the due process argument, is a universal --

1 has universal enforceability. And so, therefore, it's  
2 pretty simple in terms of what we're asking for here.

3 So, there's no consolidation, there's no necessity  
4 for any kind of consolidation, there's no necessity for  
5 coming back to the Court and refiling this with some  
6 procedural fix that the Plaintiffs are suggesting --  
7 actually, they haven't really suggested one other than they  
8 would accept service on behalf of all those people that are  
9 non-employees. So, we don't know who they are. They  
10 suggest we should give them names. How do we know? We  
11 haven't followed the cases. But what the Court does here in  
12 Roberts, I think is going to have a pronounced effect and  
13 universal effect on what happens with respect to the non-  
14 worker cases.

15 THE COURT: All right.

16 MR. LONGOSZ: Thank you, Your Honor.

17 THE COURT: Thank you. Thank you, Mr. Longosz.  
18 Mr. Cohn?

19 MR. COHN: Yes.

20 THE COURT: Mr. Busenkell, good afternoon.

21 MR. BUSENKELL: Oh, yes. Good afternoon.

22 THE COURT: Good afternoon, sir.

23 MR. COHN: So, we have a legal problem and a  
24 practical problem. Why don't I start off with the legal  
25 problem?

1 THE COURT: All right.

2 MR. COHN: So, as against Maryland Casualty --

3 THE COURT: Yes.

4 MR. COHN: -- the only two parties were Mr. Hutt  
5 and Mr. Osborn, and both of them were workers. They asked  
6 the Court for permission to -- well, for a declaration that  
7 the asbestos PI channeling injunction did not apply to their  
8 claims, and they prevailed. They got that.

9 Mr. Longosz is correct that we were not delighted  
10 with the decision as it related to persons other than  
11 workers. But as it happened, Mr. Hutt and Mr. Osborn were  
12 both workers and they got what they wanted. And the  
13 prevailing party, as you know, it's elemental civil  
14 procedure, is unable to appeal. No matter how --

15 THE COURT: Okay.

16 MR. COHN: -- deleterious the decision might be to  
17 their friends, their -- you know, their other co-plaintiffs,  
18 other people represented by the same law firm. It's still  
19 elementary civil procedure, Your Honor, that if you're the  
20 prevailing party, you cannot appeal.

21 Now, a very similar decision was issued by Judge  
22 Carey at the same time as to CNA, and in that case, the  
23 parties that we represented lost. And so, we took that  
24 appeal. So, we did what we could, Your Honor, and brought  
25 that case up to the Third Circuit.

1 THE COURT: Okay.

2 MR. COHN: So, it's simply not the case that --  
3 oh, and I'm sorry... And so, when we talk about this, Judge  
4 Carey's order -- and I'm now just back to the Maryland  
5 Casualty branch of things -- when we talk about that being a  
6 final order, it is indeed a final order, Your Honor, as to  
7 Mr. Hutt and Mr. Osborn. No one else was a party to it, and  
8 it's therefore not a final order as to anyone. It's not  
9 binding and enforceable against anyone. It is -- other than  
10 the parties to that case.

11 Now, it's certainly an indication that as to how  
12 Judge Carey would rule if similar issues were brought before  
13 him, and one can assume that he's not going to change his  
14 mind if other claimants come before him and bring the same -  
15 - you know and bring the same issues.

16 THE COURT: Right.

17 MR. COHN: But just as a matter of civil  
18 procedure, Your Honor, we could not appeal and did not  
19 appeal. And the only two parties who were the subject of  
20 that opinion prevailed against Maryland Casualty and are  
21 pursuing their claims out in Montana against Maryland  
22 Casualty. There is no final order that is enforceable  
23 against anyone else.

24 So, the issue then becomes what is the proper rule  
25 of law? And the proper rule of law is the issue that's been

1 brought in front of the Third Circuit, and that will most  
2 certainly be relevant to how the rest of these cases  
3 decided. The best way to express, Your Honor -- I mean, we  
4 set out, of course, all the arguments in our brief, but the  
5 best way to sum it up is to say that there were broad  
6 arguments that were made and there were narrow arguments.

7 The narrow arguments had to do with the workers'  
8 compensation policy not being with in Exhibit 5 to the Grace  
9 plan --

10 THE COURT: Right, right.

11 MR. COHN: -- and that's the argument that  
12 prevailed against Maryland Casualty. There were broader  
13 arguments as well, though, having to do with whether Section  
14 524(g)(4) can even apply to a claim against an insurer for  
15 its own wrongdoing. It is clear, Your Honor, that claims  
16 against insurance companies to collect on an insurance  
17 policy is clearly -- clearly, those are barred by the  
18 channeling injunction in this case and may be barred under  
19 Section 524(g)(4).

20 But it is by no means clear, and we -- and a major  
21 portion of the argument before the Third Circuit was devoted  
22 to our contention that it is not permissible under Section  
23 524(g)(4) for an injunction to -- for a channeling  
24 injunction to bar claims against an insurer for its own  
25 wrongdoing. Those aren't those, you know, claims against,

1 demands against the Debtor that are referred to in the  
2 statute. And they don't arise by reason of the provision of  
3 insurance to the Debtor in the sense that one doesn't need  
4 to plead that insurance was provided in order to have a  
5 claim against an insurer for its own misconduct.

6 And to understand that, Your Honor, I think we do  
7 need to speak about what the basis of the claims against  
8 Maryland Casualty is.

9 THE COURT: All right.

10 MR. COHN: So, the claims are that Maryland  
11 Casualty supplied industrial hygienists, doctors, you know,  
12 experts in safety, workplace safety, to Grace at the Libby  
13 facility, and that they can do their job. And they do their  
14 job in two respects.

15 One was that they discovered that there was a  
16 hazardous situation there and failed to tell the workers or  
17 anybody else. And in fact, as to Maryland Casualty, we have  
18 included in the record, there is a letter from an attorney  
19 for Maryland Casualty actually saying let's keep this under  
20 wraps because we don't want people to know, because it's  
21 going to increase our exposure as an insurance company, as  
22 an insurance company, and particularly as to workers'  
23 compensation claims. So, there's the deliberate suppression  
24 of knowledge that the insurance company had, but that the  
25 workers and other residents of Libby, Montana did not have

1 about the hazards of asbestos.

2 And the second way in which they breached their  
3 duty was to -- that they're supposed to be experts on  
4 industrial hygiene and they faced a situation where there  
5 was asbestos dust all over the place, all over the Libby  
6 facility and from the Libby facility. It was all over the  
7 town. I think Mr. Longosz referred to the whole railroad  
8 track area, you know, when the train would go barreling  
9 through town at 60 miles an hour, asbestos dust would just  
10 be -- go up into the air and just blanket the town.

11 So, that was how bad the situation was, Your  
12 Honor, and yet, and yet, Maryland Casualty does not appear  
13 to have said that the workers needed to have protective gear  
14 or in any way be protected from the hazards of asbestos  
15 dust. And of course, it was at its highest concentrations  
16 inside the Libby workplace.

17 So, the legal question that all this presents, and  
18 the question that will need to be resolved by the courts of  
19 Montana, if we're permitted to proceed that far --

20 THE COURT: Yes.

21 MR. COHN: -- is who is within ambit of the  
22 foreseeable injury from that misconduct? So, clearly, the  
23 workers. I mean, obviously if you're there onsite and  
24 there's dust covering the whole workplace and its asbestos  
25 dust, and you know that people are showing lung



1 abnormalities because you've got x-rays of the workers,  
2 clearly the workers are within the foreseeable ambit of, you  
3 know, who'd be injured by your breach of duty.

4 Our assertion, Your Honor, is that it was also  
5 foreseeable that when a worker went home to his family,  
6 walked in the door, you know, still covered with asbestos  
7 dust, because part of the problem was there were no showers,  
8 there were no procedures for them to emerge from the  
9 facility at least, without asbestos dust all over them.

10 So, they would go home. You know, they'd hug  
11 their wives and their children, and many of those came down  
12 with asbestos disease. Was that foreseeable? Well, that's  
13 an issue for the Montana courts. Mr. Longosz will  
14 presumably argue no, but that's an issue for the Montana  
15 courts to decide.

16 And similarly, with respect to the community at  
17 large, if you see asbestos dust blanketing -- you know,  
18 blanketing the community, and people are walking down the  
19 street and it's in the air, and Libby is in a valley --

20 THE COURT: Right.

21 MR. COHN: -- and the air just kind of  
22 recirculates it.

23 THE COURT: Right.

24 MR. COHN: Was it foreseeable that community  
25 members would be harmed by this breach of duty by Maryland

1 Casualty? That too is a question for the Montana courts.

2 Now, I understand the argument that says that,  
3 well, we were just a workers' compensation carrier and what  
4 we did when we went to the workplace to -- you know, had  
5 only to do with our duties as a workers' compensation  
6 carrier.

7 But under Montana law -- and we cited cases in the  
8 Third Circuit briefing on this, and in fact, it was the  
9 subject of oral argument that they showed a lot of interest  
10 in -- once you undertake the duty -- and in this case it may  
11 have been a duty that they undertook as workers'  
12 compensation carrier, but it doesn't matter on what basis  
13 that undertook the duty -- the question was, who was within  
14 foreseeable ambit of harm, who would have been injured if  
15 they breached that duty?

16 THE COURT: Yeah.

17 MR. COHN: So, that ultimately will be the issue.  
18 I'm not -- I'm laying it out here, really, by way of  
19 background because no one would suggest that that's a  
20 federal issue.

21 THE COURT: Right.

22 MR. COHN: The federal issue is, assuming that  
23 that claim is valid under state law, is it within the  
24 channeling injunction? In other words, if the way that it  
25 arises is not because of an insurance policy, but if it

1 arises because, for one reason or another, Maryland Casualty  
2 undertook these activities and foreseeably could predict  
3 that people would be injured by a breach of those -- by the  
4 improper execution of those responsibilities, may such a  
5 claim proceed, notwithstanding the asbestos PI channeling  
6 injunction. That's the issue that will ultimately need to  
7 be decided by this Court.

8 Now, the question is when, and what's the orderly  
9 process for adjudication? Well, given that those issues of  
10 statutory construction which are applicable to CNA and to  
11 MCC, having to do with, you know, not the narrow issue of  
12 was the CNA workers' compensation policy listed in Exhibit  
13 5, but the broader issue of how does -- what limits do  
14 Section 524(g)(4) place on a channeling injunction as it  
15 relates to the insurer's own misconduct. That issue is  
16 before the Third Circuit, and the Third Circuit will  
17 presumably decide it.

18 It is true that they could perhaps come up with  
19 narrow grounds for a decision vis-à-vis CNA. I mean, far be  
20 it from me to predict what a panel of judges as brilliant  
21 as, you know, Judge Ambro and the two others would --

22 THE COURT: Right.

23 MR. COHN: -- would say. But I think we're  
24 certainly going to learn something and that that something  
25 will be valuable for this Court in terms of its disposition

1 of the claims against not just CNA, but also MCC.

2 THE COURT: When was the argument before the Third  
3 Circuit, Mr. Cohn, again?

4 MR. COHN: It was in March, Your Honor.

5 THE COURT: March. Okay.

6 MR. COHN: Yeah. So, I'm told that under their  
7 procedures, we actually could get a decision as early as  
8 next month, but I'm kind of, you know, it's --

9 THE COURT: It's possible.

10 MR. COHN: I would expect that they might take a  
11 little bit longer.

12 THE COURT: Right.

13 MR. COHN: So, now let's talk about some practical  
14 concerns.

15 THE COURT: Okay.

16 MR. COHN: Because really, what this is all about  
17 is an orderly adjudication. So, well, the first practical  
18 problem I just want you to be familiar with, because it  
19 really goes to this whole idea that somehow the conduct of  
20 the Libby claimants' counsel has been contemptuous. Here is  
21 the problem that we face. If the injunction does not apply  
22 to bar these claims, the statute of limitations does -- you  
23 know, does apply, and claims must be brought during the  
24 limitations period.

25 So, the question is, how do you deal with that

1 when there is a genuine issue that's been presented about  
2 whether the injunction applies or does not apply? This is  
3 not the classic situation, Your Honor, where you say, well,  
4 don't worry about if an injunction applies because the  
5 limitations period is stayed during the applicability of an  
6 injunction.

7 Here, it's the converse situation. It's that in  
8 the situation where the injunction does not apply, we need  
9 to make sure that we keep our eye on the statute of  
10 limitations.

11 THE COURT: Yes.

12 MR. COHN: So, the limitations period in Montana  
13 begins to run when the injury is diagnosed. So, you get a  
14 diagnosis from your doctor and you have to bring suit within  
15 -- I think it's three years. Three?

16 MAN 1: Yeah, three.

17 MR. COHN: Thank you. Three years thereafter.  
18 And there are ways you can bring suit, but then you can sit  
19 on the complaint. You don't have to serve it right away.

20 THE COURT: Which is what you did?

21 MR. COHN: Exactly. So, the idea is you draw it  
22 out as long as possible, the time when -- because we don't  
23 want to put Maryland Casualty to the task of responding to  
24 complaints if they are barred by the injunction. And  
25 frankly, we don't want to ourselves litigating cases that

1 are barred by the injunction. So, the whole idea is to --  
2 is when cases aren't -- if we don't know yet whether the  
3 cases are barred by the injunction, let's put it off as long  
4 as we can.

5 In the case of -- and the Asbestos Court, the  
6 formation of the Asbestos Court, has actually very  
7 conveniently provided a means to do that, because that court  
8 is sequencing cases. And so, Mr. Hutt is going first  
9 because we know that Mr. Hutt is allowed to proceed free of  
10 the channeling injunction.

11 THE COURT: Right.

12 MR. COHN: And others wait their turn and can --  
13 and by then, we'll have a final decision of the --

14 THE COURT: Third Circuit.

15 MR. COHN: -- of the Third Circuit, and you know,  
16 I think, thereafter probably this Court, as it relates to  
17 specific claims. So, that's the rubric in which we're  
18 operating.

19 Now, Mr. Longosz did make reference to the Hunt  
20 case.

21 THE COURT: Yes.

22 MR. COHN: I apologize, by the way. We didn't set  
23 it up this way to have there be only one letter's difference  
24 between the names of the two subject Plaintiffs here.

25 THE COURT: Right.

1 MR. COHN: But the Hunt case, for odd reasons, is  
2 not in the Asbestos Court. I think it's the only case  
3 that's been referred to here this afternoon that is not in  
4 the Asbestos Court.

5 THE COURT: Okay.

6 MR. COHN: And as Mr. Longosz indicates, that  
7 judge has put it on a -- you know, on a schedule to be -- to  
8 actually be tried.

9 THE COURT: Right.

10 MR. COHN: And I understand the practical  
11 difficulty that Mr. Longosz faces. And now, I can tell you  
12 that there has never been a motion in that court to stay the  
13 proceedings in that case. But whether there is or there  
14 isn't, the fact is that if this Court were to, on a purely  
15 practical basis, issue a temporary stay of proceedings in  
16 that case, we would not object, Your Honor, because that is  
17 a practical problem that we all face, which is a case that  
18 is going to trial at a time when we don't yet have a final  
19 order determining whether the claim can.

20 But as to all the other cases, Your Honor, there  
21 is no need, in terms of protecting Maryland Casualty from  
22 having to respond to cases at a time when it's not clear  
23 whether those cases can proceed. There are no other cases  
24 to which that applies. And so, therefore, there is no need  
25 at this point for -- you know, for the entry of relief by

1 this Court. And conversely, Your Honor, there is certainly  
2 -- well, there are two forms of very important harm that  
3 will take place if this Court does proceed.

4 One is just the waste of judicial time and  
5 resources for you to essentially try to anticipate what the  
6 Third Circuit is going to do on those issues that overlap,  
7 which are the major ones, you know, the broad issues that I  
8 described of whether Section 524(g)(4) applies.

9 You cannot simply apply Judge Carey's decision  
10 because Judge Carey's decision only binds the parties  
11 thereto. And so, you need to make up your own mind and  
12 write a decision, and that decision will -- you know, you  
13 could be perfectly prescient and know exactly what Judge  
14 Ambro is going to write for that panel, and yet why go  
15 through the effort? I mean, why does that make sense as a  
16 deployment of judicial resources? Why not first get  
17 guidance from the Third Circuit and then, to the extent that  
18 there are remaining issues that are open, you know, let's  
19 come back here and figure out how we're going to deal with  
20 them?

21 To the extent the Third Circuit is clear on what -  
22 - on it, then obviously, you know, short of a, you know,  
23 rehearing (indiscernible) or the Supreme Court, or whatever  
24 --

25 THE COURT: Right.



1 MR. COHN: -- short of that, Your Honor, we  
2 recognize that. If we lose there, we have to dismiss those  
3 cases that the Court rules are barred by the injunction.  
4 But not until then, Your Honor. And that leads to the  
5 second point.

6 Okay. It's not just a waste of judicial  
7 resources; it's the unfairness to the people that Mr.  
8 Longosz would have you dismiss their cases. If we don't  
9 know -- if we don't know yet whether those cases can proceed  
10 or not proceed under the injunction, and we're required to  
11 dismiss them, the limitations period has run.

12 So, what happens if we now -- if it now turns out  
13 we prevail in the Third Circuit, and you say, well, based on  
14 that rationale, you can bring these cases -- you can bring  
15 these cases down here, or you can bring them to Montana? Is  
16 Mr. Longosz going to take the position at that point that  
17 the statute of limitations bars us from refiling those  
18 cases?

19 So, what justice requires, Your Honor, is that you  
20 not take any action requiring dismissal of the cases until  
21 it is finally decided that those cases are barred by the  
22 asbestos channeling injunction. And in the meantime, Your  
23 Honor, we commit, as we have in fact done in the Montana  
24 Asbestos Court, that we are not going to try to move forward  
25 on any cases where there is a dispute about whether the

1 injunction applies.

2 So, that, I would respectfully submit, is both the  
3 practical and the just outcome of the proceedings today.

4 THE COURT: All right. Thank you, Mr. Cohn.  
5 Thank you. I understand your position. Mr. Wisler?

6 MR. LONGOSZ: Your Honor, I think I've lost my  
7 voice, so if Mr. Wisler could reply for me.

8 THE COURT: That's fine.

9 MR. LONGOSZ: Thank you.

10 THE COURT: Of course. Mr. Wisler, yes, sir.

11 MR. WISLER: Thank you, Your Honor.

12 THE COURT: Mr. Cohn has offered a stay --

13 MR. WISLER: Right.

14 THE COURT: -- as I understand it.

15 MR. WISLER: That won't help, and I'm going to  
16 explain to Your Honor why.

17 THE COURT: Okay.

18 MR. WISLER: Mr. Cohn says there's two problems.  
19 There's actually three. There are legal and practical  
20 problems, but there's also factual issues that are  
21 important.

22 You know, Mr. Cohn spent a lot of time talking to  
23 you about the theory of his claims. But it's inescapable  
24 that all of those claims arise out of Grace asbestos. And  
25 those claims are derivative claims against Grace, and that's

1 why there was a bankruptcy and a plan of reorganization, and  
2 a Section 524 channeling injunction. That's why we're here.

3 Now, was there some issue about whether -- before  
4 Judge Carey ruled, was there some issue that could be  
5 brought in good faith as to whether workers or non-workers  
6 could bring these bad faith claims? Sure. And that's why  
7 we litigated. And that's why Judge Carey ruled. But now we  
8 know.

9 The second factual issue is, Your Honor -- I don't  
10 think Your Honor ought to do this; you're too busy -- but if  
11 you go back and look at the transcript from the argument in  
12 front of Judge Carey a couple years ago, you will find Mr.  
13 Cohn saying exactly the same things about theories of duty  
14 to warn workers, and towns and dust, and all of their  
15 claims. It's the same argument they're making to you again.  
16 Those are the facts.

17 Let me read a line from Judge Carey's opinion.

18 THE COURT: All right.

19 MR. WISLER: "While I am sympathetic to the  
20 individuals that may have suffered serious injuries, the  
21 purpose of the asbestos PI trust is to ensure that there is  
22 a fund available to compensate the victims, and there is  
23 such a trust, as well as the future claimants, while also  
24 providing finality to insurers who contributed to the  
25 trust."

1           There's a trust with hundreds of millions of  
2           dollars, and Mr. Cohn's clients have access to those funds  
3           for their claims. In fact, as Mr. Cohn will tell you, they  
4           got multipliers for their claims as part of plan  
5           confirmation. And Maryland Casualty contributed to those  
6           funds. That's why Maryland Casualty is legally entitled to  
7           the benefit of the asbestos PI channeling injunction.

8           But Judge Carey's last few words are important.  
9           There has to be finality. And we're here enforcing final  
10          orders of the Court, and that's important in bankruptcy, as  
11          Your Honor knows.

12          THE COURT: Yes.

13          MR. WISLER: Judge Carey's order is final. With  
14          due respect to Mr. Cohn, I'm not a civil procedure  
15          professor, but the idea that he couldn't have appealed an  
16          order that denied and dismissed two counts of his complaint,  
17          or four counts of his complaint, is nonsense. But it  
18          doesn't matter. The order is in fact final. The Third  
19          Circuit cannot reverse that order.

20          THE COURT: Right.

21          MR. WISLER: The Third Circuit may, as Mr. Longosz  
22          suggested, have some dicta that could affect it. But not  
23          only can't the Third Circuit Reverse it, but Your Honor, at  
24          what point do we consider a bankruptcy court final and  
25          enforceable, when I suppose someday in a completely separate

1 appeal, in a completely separate adversary proceeding, there  
2 may some day be some dicta or words out of the Third Circuit  
3 that could affect a ruling that happened before? You see  
4 that all the time.

5 THE COURT: It does, yes.

6 MR. WISLER: So, we're here because there are  
7 final orders to enforce. And Your Honor, I don't file -- I  
8 don't put my name on sanctions motions lightly. But this  
9 takes us to the third piece I was telling you about, which  
10 is the practical piece.

11 Since 2001, this has been a non-ending shell game.  
12 And this is not a criticism of Mr. Cohn. I don't mean it to  
13 be personal at all. But if you look back at the history of  
14 this case, it started with complaints against Maryland  
15 Casualty for, among other things, aiding and abetting W.R.  
16 Grace in conspiracy with W.R. Grace. And Judge Fitzgerald  
17 ruled that those claims were enjoined by the injunction that  
18 was in place in the case.

19 And the next move of the Libby claimants and the  
20 (indiscernible) attorneys and Plaintiffs' attorneys in  
21 Montana was to get rid of those counts and call it something  
22 else.

23 THE COURT: Mm hmm.

24 MR. WISLER: And since then, we've seen claims as  
25 in Maryland Casualty's insurer, just Maryland Casualty not

1 as insurer. We've seen claims for negligence. We now see  
2 claims for strict liability. The claims morph as this Court  
3 rules. As Judge Fitzgerald ruled that one thing was dead,  
4 the Plaintiffs' attorneys came up with something else that  
5 they said, well -- it reminds me of a "Saturday Night Live"  
6 skit, Your Honor. It was a person could win a million  
7 dollars if they guess the color that you thought of. And  
8 they said, "yellow", and the moderator said, "Darn, I was  
9 thinking of an off-yellow." And that's what they do. They  
10 say, well, this isn't yellow; it's off-yellow.

11 THE COURT: Yeah.

12 MR. WISLER: But the practical problem is, Your  
13 Honor, every time this Court rules, something new comes out  
14 of Montana. And the latest twist is -- excuse me one second  
15 -- that they filed a complaint in this court and asked for a  
16 declaratory judgment on two individuals as a test case. And  
17 they won two of their four counts of that complaint.

18 THE COURT: Yes.

19 MR. WISLER: And they did that as a test case.  
20 There's no question about that. But now their position is,  
21 well, we won these two counts, so we can go ahead with  
22 everybody on these worker claims. But if Maryland Casualty  
23 comes in here and says, Your Honor, enforce Judge Carey's  
24 ruling -- they say, well, hold on, that only applies to Hutt  
25 and Osborn; I've got some new plaintiffs for you, I'm going

1 to file a new adversary proceeding, which they did two weeks  
2 ago. We've got new plaintiffs for you, Judge. And if Your  
3 Honor rules against them, they'll have new plaintiffs for  
4 you again, with more off-yellow, or off-orange, or off-blue,  
5 whatever the case may be. That's our practical problem.

6 We can't keep chasing the shell game. There are  
7 final orders in place. And if they get changed next month,  
8 or next year, or 10 years from now, that doesn't change the  
9 fact that they're being violated. And we didn't file the  
10 motion to enforce to punish people. We filed the motion to  
11 enforce so Your Honor would say orders of this Court mean  
12 something.

13 THE COURT: Yeah.

14 MR. WISLER: And finally, on the due process and  
15 Your Honor's point about we didn't bring a sort of class  
16 claim, or whatever it is. Your Honor, the asbestos PI  
17 channeling injunction is a form of -- it was part of a plan  
18 confirmation order. And plan confirmation orders, to the  
19 extent they have injunctions, are enforceable against the  
20 world.

21 Mr. Cohn doesn't argue that the asbestos PI  
22 channeling injunction isn't something applicable to all of  
23 his co-counsels' potential plaintiffs in Montana, because it  
24 is enforceable against all of them. It's a Federal Court  
25 injunction that applied all claims -- claimants who would

1 file. So, yes, there is a -- we'll call it a clarification  
2 order from Judge Carey, and only two parties were parties to  
3 that because those are the only two parties that Mr. Cohn  
4 brought to this Court. But that was only a channeling  
5 injunction -- I'm sorry, a declaratory judgment to clarify  
6 an injunction that we're here to enforce. And that's the  
7 asbestos PI channeling injunction.

8 And we know from Judge Carey's ruling that the  
9 asbestos PI channeling injunction enjoins claims against  
10 non-workers, against -- I'm sorry, by non-workers --

11 THE COURT: Right.

12 MR. WISLER: -- against Maryland Casualty. That's  
13 what we know. That's what we're here to enforce. Due  
14 process, stays, everything else doesn't that. The orders  
15 are final, regardless of whether they change someday or not.

16 THE COURT: All right. Thank you, Mr. Wisler.  
17 That was helpful. Mr. Cohn, anything further from you?

18 MR. COHN: Just one brief point, Your Honor.

19 THE COURT: Yes.

20 MR. COHN: It is simply not the case that Judge  
21 Carey's decision says that non-worker claims are barred.  
22 What he said is that claims are barred except to the extent  
23 that they arise out of or are based upon MCC's workers'  
24 compensation policies.

25 So, I understand that they're taking the position



1 that a non-worker cannot state a claim that arises out of  
2 the workers' compensation policies. But in this case, to  
3 the extent that Maryland Casualty undertook duties as  
4 workers' compensation carrier, had a duty to disclose  
5 dangers they had found in the workplace, sent the industrial  
6 hygienist in, they should have fixed the dust problem --  
7 they didn't -- to the extent that those duties were  
8 undertaken as a workers' compensation carrier, but others  
9 had the right to benefit from the ambit of foreseeable harm  
10 if those duties were breached, those people too resubmit can  
11 bring claims.

12 And Judge Carey -- that was not an issue that he  
13 ruled upon. And not only that, I don't think he would have  
14 ruled upon it because, as he himself said in his decision,  
15 "Those are matters for state law. My role is to describe  
16 what the channeling injunction permits or bars. My role is  
17 not to decide whether these are valid claims under state  
18 law."

19 So, to the extent that anyone, a worker, or a  
20 spouse of a worker, or a community member wants to go to  
21 Montana and bring suit arising out of the workers'  
22 compensation policies, they may do so under Judge Carey's  
23 order. I didn't dwell on this the first time because Judge  
24 Carey's order doesn't apply anyway because it was just as  
25 between the parties. But when you look at what he actually

1 said, he is not barring anybody from bringing suit arising  
2 out of the MCC workers' compensation policies. Thank you.

3 THE COURT: Thank you, Mr. Cohn.

4 MR. WISLER: Your Honor, just a dozen words.

5 THE COURT: You get the last word. It's your  
6 motion.

7 MR. WISLER: Thank you, Your Honor. Mr. Cohn's  
8 right. He didn't make that argument before. That's the  
9 off-yellow that we fear that will never end.

10 THE COURT: Right. Yeah. Okay. Well, you know,  
11 I'm not going to rule today. I'm obviously going to reserve  
12 decision because I want to go back, I want to look at Judge  
13 Carey's opinion again, and look at the arguments again. And  
14 then I'll issue a ruling this promptly as I can. It's  
15 clearly an important matter.

16 And you know, my sense is that the channeling  
17 injunction was intended to bring some banality to disputes.  
18 And what I have to determine is whether or not the claims,  
19 in particular of Ms. Roberts, fall within -- without that  
20 finality. And I think that's really the issue before the  
21 Court, and the one that I'll have to decide, and the one  
22 that I'll have to decide carefully because it obviously has  
23 implications.

24 So, I appreciate your briefing. I appreciate the  
25 arguments. And then I'll reserve decision and decide the

1 matter. All right. Thank you all. Thank you for good  
2 arguments. Safe travel.

3 ALL: Thank you, Your Honor.

4 THE COURT: And with that, we'll stand in recess.  
5 Good afternoon, everyone.

6 MR. WISLER: Good afternoon, Your Honor.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

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Ledanski Hyde

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